IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-714

ALAN MACKERLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

****

BRIEF OF RESPONDENT ON MERITS

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CASE NO. SC00-714

ALAN MACKERLEY v. STATE OF FLORIDA

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Appellee herein, certifies that the following additional persons and entities have or may have an interest in the outcome of this case.

1. The Honorable C. Pfeiffer Trowbridge, Circuit Court Judge, Nineteenth Judicial Circuit

2. The Honorable Robert A. Butterworth, Attorney General

3. Celia A. Terenzio, Assistant Attorney General, Bureau Chief (Counsel for the State of Florida, Respondent)

4. Steven R. Parrish, Assistant Attorney General (Counsel for the State of Florida, Respondent)

5. The Honorable Bruce Colton, State Attorney Nineteenth Judicial Circuit

6. Frank L. Black (Complainant/Victim)

7. Jeffrey S. Weiner, Esq., Assistant Public Defender (Trial Counsel for Petitioner/Appellant)

8. Paul Morris, Esq., Stephen H. Rosen, Esq. (Appellate Counsel for Petitioner/Appellant)

9. Alan Mackerley (Petitioner/Appellant/Defendant)

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and Appellant before the Fourth District Court of Appeal, and will be referred to herein as “Petitioner” or “Defendant” or “Appellant”. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee on appeal, and will be referred to herein as “Respondent” or the “State”.

The following symbols will also be used:

“R” = Record on Appeal

“T” = Transcript on Appeal

STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts violates the warnings set forth by this Court in Overfelt v. State, 434 So. 2d 945 (Fla. 4th DCA 1983), quashed in part (on other grounds) and approved in part, State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

> The facts should be stated clearly, concisely, and objectively. A slanted or argumentative factual statement is of little or no assistance and does not truly advance any appellant's prospects of reversal.

Id. at 949. Appellant's statement is a jury argument and an incomplete recital of the facts. Therefore Appellee submits the following additional facts from the testimony and evidence presented at trial:

Diane Black

Diane is the twenty-eight year old daughter of the victim (V10 242). She testified that her father, the victim, owned Frank L. Black Bus Service, Inc. (V10 244). Her father was very involved in the business and was a part in everything that was going on (V10 245-46). Her father had a cellular phone, and he was always in contact with the office on a regular basis even when he was away (V10 246).

Her father also kept in touch with her and her sister on a regular basis (V10 247, 256). He never went more than a couple of

days without contact (V10 247). Because of her father, she was involved in the bus business (V10 248). She went to bus meetings with her father (V10 248). Her father avoided any contact with Appellant (V10 251). She testified that her father did not want to go to these bus meetings alone because of Appellant (V10 265). She identified her father's signature on the February 24, 1996 Kiwi Airlines Boarding Pass for a flight from Newark, N.J. to West Palm Beach, FL (Trial Exhibit 1, V10 253). Her father had never taken a trip to Florida for business before this (V10 255). She identified her father's home phone number and work phone numbers (V10 254). She stated that she had never heard of a Lisa Costello or a Lisa Nardiello (V10 252).

Leanna Black

Leanna is the thirty year old daughter of the victim (V10 268). On the evening of Friday, February 23, 1996, her father told her that he was taking a business trip to Florida (V10 282). Her father stated that a woman called him from Florida and she was interested in purchasing sixty (60) school vans (V10 283). The woman had little knowledge of the bus industry, and she wanted him to come down to Florida (V10 283). These schools vans were ultimately to be shipped to Chile (V10 285). Her father said he would be leaving on Saturday, February 24, 1996, and would return

on Sunday, February 25, 1996, or at the latest on Monday, February 26, 1996 (V10 285-86). She was supposed to meet with her father on Tuesday, February 27, 1996 (V10 286).

She again spoke to her father on Saturday, February 24, 1996 (V10 289). He again told her about his business trip to Florida, and that he would be leaving on a Kiwi airline flight at approximately 3:00 p.m. (V10 289). This was her last contact with her father (V10 291). It would be very unusual for her not to hear for her father for days (V10 290). He did not pack for a long trip, and none of his personal assets or belongings were missing (V10 290). There was nothing to suggest that he would be gone for a long time (V10 290).

Her father was considering selling his bus business to Ryder or to her (V10 287). She was familiar with the bus business (V10 287). The negotiations with Ryder for the sale of the business were extremely confidential (V10 288). Her father did not want others including his own employees to know (V10 288).

Appellant and her father were bitter competitors in the bus industry (V10 307). Her father would avoid all contact with Appellant (V10 307). There were people who criticized the way her father operated his bus business and Appellant was among those people (V10 309). Her father bid on and was awarded routes that

Appellant's company had previously run in Mine Hill (V10 288-89). Her father did not know a Lisa Costello or Lisa Nardiello (V10 290).

Joseph Cacia

Mr. Cacia knew the victim because he used to be a school bus operator and a member of the board of trustees of the New Jersey Bus Owners Association along with the victim (V10 319). He also knew Appellant (V10 320). In 1987, he sold his bus company to Ryder and worked for Ryder as a region manager (V10 321). He now works for Ryder as an acquisition manager for the school bus division (V10 322). His duties are to seek out and contact quality bus companies to initiate the acquisition process (V10 322).

In December of 1995. he talked with the victim about Ryder acquiring his business (V10 324). In February of 1995, he presented the victim with a letter of intent which was an offer to buy the company (V10 324). Ryder was interested in the victim's company because it was a good, quality bus company that met Ryder's criteria for reputation, profitability, and facilities (V10 325, 339).

The victim told Mr. Cacia that someone in Florida was interested in purchasing sixty (60) vans (V10 326). On February 22, 1996, around 5:00 p.m., Mr. Cacia was with the victim when he

received a phone call from a lady in Florida asking if he was going to come to Florida (V10 329). The victim stated that the lady was going to pay for his transportation (V10 330, 335). The victim expressed concern about going (V10 331). He said it was strange that they knew his phone number but did not give him a number to call (V10 332).

Paul Anderson

Mr. Anderson manufactured sixteen (16) and twenty (20) passenger school buses in Bridgewater, N.J. (V11 357). He made school buses for Appellant, but did not know him socially (V11 359). Appellant had asked Anderson not to sell buses to the victim because there was a great deal of animosity between them (V11 397, 403). He knew the victim through business and socially (V11 359). The victim sold Mr. Anderson's school buses to school boards and private contractors (V11 359). The victim used the buses for his own business too (V11 359).

Mr. Anderson testified that the victim was a micro manager of his bus business, and that he was in constant contact with his office (V11 360). On February 23, 1996, the victim called Mr. Anderson twice -- at noon and 6:00 p.m. (V11 361). The victim wanted advice and cooperation on a business deal where people from Florida wanted to purchase sixty (60) vehicles (V11 361). The

victim stated that the purchasers had seen the vehicles and they wanted to export them to Chile (V11 361).

The victim stated that the purchaser in Florida was a woman named Mia Giordano, who was with the Valdez Exporting Company (V11 362). The victim wanted to buy the chassis, have Mr. Anderson build the bus, and the victim would transport the product to Florida (V11 362). The victim told him that he was flying to Florida on Saturday and that Valdez Exporting was going to buy his ticket (V11 395). Mr. Anderson never heard of Lisa Costello (V11 360).

Sally Roberts

Ms. Roberts was the long time girl friend and office manager for the victim (V11 406). They started dating in October, 1991, and she became the office manager in April, 1993 (V11 406-07). She did not know Lisa Costello or Lisa Nardiello (V11 409).

A week prior to February 24, 1996, as the office manager, she received phone calls from Mia Giordano (V11 407). The victim told her that he was flying on a business trip to Florida (V11 408). He stated that he would return on Sunday, February 25 or Monday, February 26 (V11 408).

While he was away from the office, the victim kept in constant contact with the business (V11 408). He used his cellular phone

(V11 409). The victim also kept in close contact with his daughters (V11 409). In 1985, the victim bid on and received the public bus contract for the Mine Hill route (V11 410). This route was previously owned by Appellant's company (V11 410). The victim underbid Appellant by one half of what Appellant had the contract for (V11 411).

At a March, 1995 bus meeting, she heard Appellant make derogatory remarks regarding the victim (V11 412). She was talking with Jim Anderson, and Appellant participated in part of the conversation about the Mine Hill bus route (V11 413). Appellant stated that the victim was the type of person that steps on people's toes and he was going to bury him (V11 414). He made this remark in the context of business (V11 426). This conversation took place one week after the victim was awarded the Mine Hill bus route (V11 413). Appellant asked Ms. Roberts why the victim was doing this to him (V11 414-15).

John Turkington

Mr. Turkington is a special agent for the FBI (V11 427). He conducted a search for Mia Giordano and determined that there was no such person (V11 429). Appellant stipulated that Mia Giordano is Lisa Costello (V11 429).

Linda Steppone

Ms. Steppone was the dispatcher for the victim's bus company (V11 430). She testified that the victim was in constant contact with his business and was a micro manager (V11 434-35). On Friday, February 23, 1996, the victim told her that he was flying to Florida on Saturday (V11 431). He stated that he would be back late Sunday or early Monday morning (V11 434). His trip was in reference to a purchaser of school buses that would be shipped to South America (V11 431). He mentioned the name Mia Giordano (V11 431).

Ms. Steppone answered the phone when Ms. Giordano called (V11 431-32). She called several times before and after lunch time (V11 431-32). The calls started on Tuesday, February 20, and ended on Friday, February 23, 1996 (V11 431-32). She spoke to Mia Giordano about six (6) to eight (8) times (V11 432).

James Haggar

Mr. Haggar owned a bus company in New Jersey (V11 437). He was close friends with the victim, and they shared a common interest in the bus business and trains (V11 437).

On Saturday, February 24, 1996, at 9:30 a.m. he had a conversation with the victim (V11 438). The victim told him that he was going to Florida in a couple of hours and would return Sunday or Monday morning (V11 438). The victim stated that he was

working on a business deal for the purchase of sixty vans for export to South America (V11 439). The victim told him that a girl called and wanted him to come to Florida to finalize the deal and they would pay for his airfare (V11 439). The plane ticket was waiting at the Newark Airport (V11 439).

The victim stated that the girl said she would pick him up, take him to where he was going to stay for the evening, and then meet the people at dinner (V11 441). She described herself to the victim as five (5) feet tall, all legs, blonde, and the hottest thing he'll see when he gets off the plane (V11 441). The victim had no call back number for this girl (V11 442). Mr. Haggar has not had contact with the victim since that conversation (V11 442).

The victim always kept in contact with his business (V11 442). The victim and Appellant were competitors with animosity (V11 440). The victim never spoke of Lisa Costello or Lisa Nardiello (V11 443).

Lucille Black

Ms. Black is the ex-wife of the victim (V12 510). They were married in 1963 and divorced in 1991 (V12 510). During the probate of the victim's estate, there were no missing funds (V12 512).

Frederick Meyer

Mr. Meyer is a Detective/Sargent First Class with the New

Jersey State Police (V12 14). He located the victim's car at the Newark Airport in the short term parking area (V12 515). The car was left there on Saturday, February 24, 1996 (V12 515).

Maria Calzadilla

Ms. Calzadilla worked at the Kiwi airline ticket counter in Newark, N.J. on February 24, 1996 (V12 545). She talked to the victim and issued him a one-way ticket from Newark, N.J. to West Palm Beach, FL (V12 546-47).

Michael Driscoll

Agent Driscoll is a special agent with the Florida Department of Law Enforcement (V11 447). He subpoenaed the telephone records of Lisa Costello and Appellant (V11 448). State's Exhibit 6 was Lisa Costello's home telephone records for the period ending March 19, 1996 (that included calls between February 22 and 24, 1996), and State's Exhibit 7 was Appellant's Martin County home telephone records for the period ending March 5, 1996 (that included telephone calls between February 22 and 25, 1996) (V11 451-52). The victim's home phone calls were forwarded to his office (V11 455).

Agent Driscoll also subpoenaed the telephone records for Appellant's cellular phone (State's Exhibits 8 and 11) (V12 466), the telephone records from a public telephone in Bluff's Shopping

Center located near Lisa Costello's apartment (State's Exhibit 9) (V12 470), and the victim's telephone records from his home and office combined (State's Exhibit 14) (V12 475-76).

The following calls and corresponding events were documented and are set forth in chronological order:

1. February 22, 1996, 1:08 p.m., call from Costello residence to victim's business in N.J. (V11 454-55).

2. February 22, 1996, 4:13 p.m., call from Appellant's residence to victim's business, 30 minutes (V11 456).

3. February 22, 1996, 5:10 p.m., call from Appellant's residence to victim's business, 7 minutes (V11 456).

4. February 23, 1996, Several calls from Appellant's residence to the victim's business (V11 456).

5. February 24, 1996, series of phone calls from Costello residence to victim's residence in N.J. (V11 455).

6. February 24, 1996, 11:25 a.m., call from Appellant's cell phone to Costello's apartment (V12 472).

7. February 24, 1996, 11:41 and 11:42 a.m., call from Appellant's cell phone to Dennis Hammell (V12 472). AT&T Wireless records indicate that these calls were made from the Jupiter Island area (V12 494).

8. February 24, 1996, 12:40 p.m., call from Appellant's cell

phone to pay phone at Bluff's Shopping Center (V12 473). AT&T Wireless records indicate that this call was made from the Jupiter area (V12 494).

9. February 24, 1996, Three phone calls from pay phone at Bluff's Shopping Center to victim's home (V12 473-74).

10. February 24, 1996, One phone call from pay phone at Bluff's Shopping Center to victim's business (V12 473-74).

11. February 24, 1996, 2:37 p.m., call from Appellant's cell phone to Kiwi Airlines (V12 475).

12. February 24, 1996, 2:51 p.m., call from Appellant's cell phone to pay phone at Shell Gas Station at PGA Blvd. and Military Trail (V12 475, 486-87). At the same time, 2:51 p.m., Appellant's American Express card records show a purchase made at this Shell Gas Station for $23.08 (V12 486-88).

13. February 24, 1996, 3:08 p.m., call from Appellant's cell phone to New Jersey Directory information (V12 478).

14. February 24, 1996, 3:09 p.m., call from Appellant's cell phone to Kiwi Airlines in Newark, N.J. (V12 478).

15. February 24, 1996, 3:10 p.m., call from Appellant's cell phone to Kiwi Airlines 800 number (V12 479).

16. February 24, 1996, 3:18 p.m., Two calls from Appellant's cell phone to New Jersey Directory Assistance (V12 479).

17. February 24, 1996, Three calls from Appellant's cell phone to Kiwi Airlines (V12 479-80).

18. February 24, 1996, Calls at 3:41 p.m., 3:42 p.m., and 3:45 p.m. from pay phone at Newark Airport next to Kiwi Airlines ticket counter to pay phone at Shell Gas Station at PGA Blvd. and Military Trail charged to victim's credit card (V12 475-77).

19. February 24, 1996, call from Appellant's cell phone to 411 local directory assistance (V12 480).

20. February 24, 1996, 4:28 p.m., call from Appellant's cell phone to Hertz Rental Car in West Palm Beach adjacent to the airport (V12 480). AT&T Wireless records indicate that all calls made after approximately 4:30 p.m. were made from the West Palm Beach airport area (V12 499-501).

21. February 24, 1996, Two calls from Appellant's cell phone to Kiwi Airlines (V12 480).

22. February 24, 1996, One incoming call to Appellant's cell phone from Dennis Hammel (V12 481).

Agent Driscoll subpoenaed the victim's debit card statements for February and March, 1996 (V12 502). It showed the purchase of a Kiwi Airlines one-way ticket from Newark, N.J. to West Palm Beach, FL, for $266.00 on February 24, 1966. (V12 502, 558-59). It also showed a purchase at a Shell service station in North Miami

for $7.78 on Sunday, February 25, 1996 (V12 559).

The debit card investigation led Agent Driscoll to an Embassy Suites Hotel in Riviera Beach, FL (V12 550). There were charges to the victim's credit card from the phone/fax in the lobby of the hotel (V12 550). These charges were done on Sunday, February 25, 1996 between 1:30 a.m. and 2:30 a.m. (V12 551). The calls were to directory assistance or to major hotels in Miami Beach (V12 551). During the course of the investigation, Agent Driscoll spoke to Karen Vorhees, the night clerk for the hotel (V12 552, V13 568). Ms. Vorhees identified Costello from a photo line-up as the women who was using the phone/fax at that time (V12 553-55). Ms. Vorhees testified that on February 25, Costello came in around 1:00 a.m. and asked for change for the pay phone (V13 569). Costello parked her car right in front of the desk area and left it running (V13 569-70). Costello said that she was trying to find a hotel closer to South Beach (V13 570). Costello used the pay phone a number of times and then used the fax phone (V13 571). Costello swiped a credit card through the fax phone (V13 571). She was in the lobby for about forty-five (45) minutes (V13 571). Costello seemed "wired", like she had a lot of nervous energy or was stressed out (V13 572).

Additionally, Agent Driscoll subpoenaed rental car records

from Hertz rental car (State's Exhibit 15) (V12 504). The records indicate a car rented by Lisa Costello on February 24, 1996 at 6:16 p.m. (V12 505). The car was returned on February 26, 1996 at 6:23 p.m. (V12 505). The car was paid for by cash, and four hundred and twenty three (423) miles had been traveled on the car (V12 505). Michelle McReynolds, the roommate of Lisa Costello, drove with Costello to Hertz to return the rental car on February 26, 1996 (V13 606). Costello drove the rental car and Ms. McReynolds drove her own car (V13 606).

The Kiwi Airlines flight from Newark, N.J. to West Palm Beach, FL arrived at 6:38 p.m. (V12 506). Appellant stipulated that Appellant drove Lisa Costello to Hertz rental car on February 24, 1996 (V12 509).

On March 2, 1996, Agent Driscoll visited the Appellant's residence with Detective/Sargent Timmons of the Martin County Sheriff's office and spoke with Appellant (V13 594, 599-600). He knew at the time that calls to the victim had originated from Appellant's residence and Costello's apartment (V13 600). Appellant denied any recent contact with the victim within the last month or so (V13 601). He claimed that the last time he saw the victim was at a bus meeting two (2) months ago in N.J. (V13 596,601). Appellant denied knowing Mia Giordano or anyone fitting

that description (V13 597, 601). Remodeling was being done in the front hallway, entryway, and front room of Appellant's house (V13 598, 603). There was painting being done and no carpeting was down (V13 603).

Scot Rice

Mr. Rice was a friend of Lisa Costello's for about four (4) or five (5) years, and an acquaintance of Appellant (V12 518-19). Costello had asked him to watch Costello's nephew, Joey, on February 24, 1996 (V12 520). She asked him and his fiancé, Caryn Meade, to take Joey to the remote control car races on that day (V12 520). On that day, he and Caryn went to Costello's apartment in Jupiter to pick up Joey around noon (V12 519-20). At the apartment was Joey, Costello, and Appellant in addition to himself and Caryn (V12 521). Appellant arrived at about 12:15 p.m. in a two door Mercedes (V12 521-22).

Mr. Rice met Joey and Caryn at the remote control car races and stayed until about 10:00 p.m. (V12 524). While at the races, Costello paged Mr. Rice (V12 524). Caryn called and spoke to Costello, and then Costello talked to Joey (V12 524). Joey was visibly upset after the conversation (V12 525). After the conversation, Joey told Mr. Rice that Costello told him that she would not be coming home that night (V12 525). Mr. Rice dropped

Joey off at Costello's apartment between 10:00 p.m. and 12:00 p.m., and when they dropped him off, he was alone (V12 525-26).

Caryn Meade

Ms. Meade is the fiancé of Mr. Rice (V12 528). She was not a close friend of Lisa Costello, but knew her through Rice (V12 529). Costello had called her and asked her to babysit her nephew, Joey, on Saturday, February 24, 1996 (V12 530). This was an inconvenience because she and Rice had planned to detail cars on that day, but she agreed (V12 530). On February 24, 1996, she and Rice arrived at Costello's apartment around noon (V12 531). Costello, Joey and Appellant were there (V12 531). They left the apartment, returned soon after to pick up a battery charger that Joey had left behind, and then rode around Royal Palm Beach looking for Rice who was at the detailing job (V12 532). They did not find Rice, so they went to the races around 3:00 p.m. (V12 533).

While at the races, Rice received a page from Costello (V12 534). Caryn called Costello (V12 534). Costello was very short with Caryn, which was out of character for Costello (V12 534). Costello asked them to bring Joey home and then asked to talk with Joey (V12 534). Joey told Caryn that Costello had promised him that she would be home tonight, but now she is not coming home (V12 535). Rice and Caryn dropped off Joey at Costello's apartment

around 11:30 p.m. (V12 535). No one was home that she knows of (V12 535).

Larry Duffany

Mr. Duffaney is a yacht restoration painter (V13 574). In February of 1996, he did yacht restoration for Appellant on his fifty-two (52) foot Hatteras (V13 575). On Wednesday, February 20, 1996, Appellant told him to have the boat ready to go out (V13 577-79). This was an inconvenience because the engine was apart (V13 580). On Sunday, February 25, 1996, Mr. Duffaney went by Sandspirit Park where the boat was kept at around 11:00 a.m. or noon, and the Hatteras was not parked in its slip (V13 580).

Herbert Dillon

Mr. Dillon was Appellant's accountant and a good friend of Appellant's (V13 582). He testified that Bill Anderson was a close friend of Appellant's (V13 583). He knew Lisa Costello, and knew that she was Appellant's girlfriend (V13 585). He became aware that the victim was missing and he asked Appellant about phone calls from Appellant's residence to the victim (V13 586). Appellant did not answer this question (V13 587).

Robert Samandajian

Mr. Samandajian is Appellant's son in law (V13 656). On Sunday evening, February 25, 1996, he received a call from

Appellant, but he did not speak with him (V13 656). Appellant called again on Monday morning at 7:25 a.m. and his wife spoke to Appellant (V13 657-58). She told him that Appellant called and wanted him for a construction project (V13 658). Mr. Samandajian went to Appellant's house on that Monday (V13 657). When he arrived, there was a pocket door on the lawn along with a couple of pieces of drywall and carpet (V13 658). This had all been removed from the front hall of the house (V13 658). He helped Appellant with the renovation (V13 659).

On Wednesday of that week Appellant mentioned to him that the victim was missing and was last heard of getting on a plane in Newark heading for West Palm Beach (V13 659). On Friday, Appellant told him that the victim had been to the house the previous Saturday night -- February 24, 1996 (V13 660, 679). Appellant claimed that he did not know why the victim came to the house (V13 661). He thought Appellant did not want to talk about it so he did not ask him any questions (V13 661). Appellant expressed concern about law enforcement authorities coming to his home, and was afraid that if they found any of the victim's hair in Appellant's house they would try to blame him for the victim's disappearance (V13 663). Appellant mentioned the O.J. Simpson case and trace DNA in hair to place the victim at Appellant's home (V13 664).

Two to three weeks after the initial construct project, Appellant decided to re-carpet the entire house (V13 665). The two vacuum cleaners they used to clean up the construction waste, a canister and an upright, they threw out at the Martin County dump (V13 666). They bought new vacuum cleaners (V13 666).

Jay Miller

Agent Miller was a special agent with the FBI (V12 481). After the victim's disappearance, he investigated purchases on Appellant's credit card (AT 1368). On Sunday, February 25, 1996, there is a charge on Appellant's credit card from a K-Mart in Stuart (AT 1368). An investigation of this purchase revealed that it was for a trash can, two (2) rolls of duct tape, trash bags, handy wipes, a scrub sponge, additional handy wipes, trash bags, assorted sponges, and three more units of trash bags (AT 1370). On Monday, February 26, 1996, there was another purchase on Appellant's credit card at this K-Mart for cleaning supplies (AT 1370).

Agent Miller also assisted in setting up Mr. William Anderson with technical devices to surreptitiously tape conversations between Appellant and Mr. Anderson (AT 1452-53). He furnished Mr. Anderson with a subpoena as a reason for his meeting with Appellant (AT 1452).

Sanford Shirk

Deputy Shirk is a Deputy Sheriff for the Martin County Sheriff's Office (AT 1372). On August 29, 1996, he investigated the Appellant's home as a crime scene (AT 1373). He stated that the house has a boat dock and ocean access (AT 1377).

In the course of his investigation, Deputy Shirk noted that construction had been done on the front hall where a pocket door had been removed, and new drywall and a hanging door had been installed (AT 1379, 1381). There was overspray from painting on the floor in the living room and the front room (exercise room) (AT 1383-84). There was no overspray on the floor in the front hallway, but there were scrape marks on the floor where a cleaning process had taken place (AT 1386). There was new carpet and padding in the front hallway and living room (AT 1387-88). There was old carpeting and padding in the front exercise room (AT 1388).

John Marich

Lieutenant Marich was a lieutenant with the Florida Marine Patrol (AT 1411). He examined the Global Positioning System (GPS) device removed from Appellant's Hatteras boat (AT 1418). During his investigation, a reading on the GPS was a "way point" that was not a navigation point (AT 1432). This "way point" was sixteen (16) miles S-SE of St. Lucie buoy (AT 1432). The ocean is nine

hundred (900) feet deep at this point, and this area is the desert of the ocean (AT 1432-34).

Michelle McReynolds

Ms. McReynolds lived with Lisa Costello in February 1996 (V13 605). She was aware that Lisa was Appellant's boyfriend at the time (V13 605). Lisa was a drug user, and among other drugs, had Rohypnol - commonly known as the date rape drug - in her possession in February 1996 (V13 607-08). Ms. McReynolds knew this because she saw Lisa with foil packets of the drug with "Roche Rohypnol" written on them (T 608), and had in fact used some herself (V13 622).

William Anderson Jr.

Mr. Anderson has known Appellant since 1975, and was personal friends from 1977 until the murder (V14 775). Appellant was Anderson's mentor in the bus business (V14 778). He also knew the victim, and this relationship went from friendly, to testy, to adversarial, and then to ambivalent (V14 781). The victim had the finest fleet of buses, but his bidding and people skills were not on par with Appellant's (V14 782). The victim had bad bidding practices which resulted in bad busing practices (V14 783).

In January or February of 1996, Appellant wanted to purchase the victim's bus business, but the victim would not talk to

Appellant (V14 789). Appellant was angry and frustrated at this (V14 790). Appellant was afraid that the victim was building up his business for sale, and in the process, Appellant could lose his biggest contract in Hoptacong (V14 792, V17 1145). Appellant was also angry at the victim when the victim bid on and won the Mine Hill contract, and Appellant stated that he would have to teach the fuck another lesson (V14 793, V17 1143). Appellant said that he hated and despised the victim for many years (V14 799).

Mr. Anderson knew Lisa Costello as an employee at Appellant's night club (V14 800). He offered to take care of Appellant's plane and fly Appellant around in exchange for use of the airplane (V14 802). Appellant and Anderson agreed to this deal (V14 803).

Anderson was in Mt Dora, Florida working on the airplane when he received a call from Appellant on Wednesday, February 28, 1996 (V15 809-10). Appellant asked him how soon he could get the airplane down to Stuart (V15 811). Anderson told him that it was in no condition to fly, but Appellant asked if it could be down there early in the morning (V15 812). Anderson asked why he needed it, and Appellant stated that he needed to go look for something in the ocean (V15 812). Anderson asked if he sunk his boat or if someone fell off, and Appellant replied something like that (V15 813). Anderson asked what he was going to look for, and Appellant

stated that the victim was missing and that he killed him (V15 813). Appellant explained that he dumped the victim's body from his boat out in the ocean and he wanted to fly over and see if the body was floating (V15 813). Appellant stated that he knew the coordinates of where he dumped the body (V15 814). He said he dumped the body between twelve (12) to (22) miles out (V15 814).

Anderson explained about the Air Defense Identification Zone and that they would be flying in and out of it if they went on this search (V15 814). He explained that if he flew in circles he would be going in and out of the zone and they would have to file a flight plan (V15 815). Anderson advised that it was better that he hire someone else, and he tried to dissuade Appellant (V15 815). He explained that it was almost impossible to find somebody in the ocean from an airplane (V15 816). He also told Appellant that if the body was in the Gulfstream that it could be in North Carolina by now (V15 816). Appellant stated that he still wanted to look and he didn't want to hire anybody else because he needed somebody he could trust (V15 816).

Anderson had several other conversations with Appellant about the murder over a period of several weeks -- at home in vehicles, at breakfast, and in a couple of restaurants (V15 818). Appellant stated that his accomplice brought the victim into his house and

the victim recognized Appellant (V15 819). Anderson asked whether the victim had resisted, because he thought that once the victim recognized Appellant, at that point he would be in a panic having realized that something was amiss. Appellant told him that the victim wasn't capable of resisting (V15 821). Appellant then grabbed the victim in a headlock, took the gun, and shot him through the head, turning his own face away to avoid the debris or splatter (V15 819). The accomplice got the victim to Appellant's house and gave Appellant the gun (V15 828).

The shooting took place in the very front of the house near the front door (V15 819). Appellant said that there was a huge amount of blood and it got all over the walls, ceiling, carpet and floors (V15 820). He said there was blood all over the carpet so he got rid of the carpet (V15 820). Appellant intentionally kicked a can of paint over on the carpet to make an excuse for throwing away the carpet (V15 820-21). The victim could not resist because he was incapable of resisting (V15 821).

Appellant took the body and wrapped it up with all of his belongings (V15 822). He took it out on his boat and dropped it in the ocean (V15 822). Appellant put the gun with the body (V15 822). Appellant stated that he put weight in the bag but the body would not sink, so he stabbed several holes in the plastic (V15

822). Appellant commented that he couldn't believe how much gas accumulated in the plastic in twelve (12) hours (V15 823). Appellant stated that when he punched the holes in the plastic that the gases had a horrible odor, and he joked that he knew the victim was rotten but not that rotten (V15 823).

Appellant talked several times about cleaning up the murder scene (V15 823). He mentioned that he took the carpet to the Palm Beach County dump, and he asked Anderson if he thought that he had forgotten to do anything in the clean-up (V15 823). Appellant stated that he tore the walls down and took it to the dump because of the debris from the victim (V15 824). Appellant claimed he cleaned everything with solvents and bleaches (V15 824-25). They discussed getting Appellant's affairs in order and making an exit (V15 824).

Appellant stated that he called the victim in N.J. from Lisa Costello's house (V15 825). He left a message on the victim's answering machine, and was proud of how he decoded the machine and erased the message (V15 825). Appellant showed no remorse and stated that "The fuck deserved it" (V15 826). He explained that on the night of the murder, he drove to Miami and swiped the victim's credit card through a gasoline pump so they would look for the victim there (V15 826).

Mr. Anderson heard Lisa Costello and Appellant discussing a newspaper article about a night hotel clerk identifying Costello as the lady using the victim's credit cards, and Costello told Appellant that she could not I.D. her (V15 827). Costello walked away from the conversation and Appellant said "oh shit" (V15 827).

Mr. Anderson agreed to talk to the police and then agreed to wear a wire and talk to Appellant (V15 832). Anderson called Appellant and told him that he had been subpoenaed and needed to talk with him (V15 835). Appellant came to Anderson's house where they had a discussion that was videotaped and audiotaped by law enforcement (V15 836).

On the audiotape, Mr. Anderson asks if the victim's credit cards went down, to which Appellant responds: "No one can ever prove, no one can ever prove that you know what I've done." (T 1265). Anderson tells Appellant that if he gets nailed for perjury, he wants Appellant to cut a deal where Appellant confesses and Anderson goes free, to which Appellant responds: "All right. You got it." (T 1265). Anderson then tells Appellant that he does not know why Appellant had those conversations with him and states that he wishes Appellant had not done that to which Appellant responds: "I apologize for having conversations with you" and "Nobody knows any conversation that you and I ever had. No one."

(T 1267). Anderson asks Appellant if he has told anyone that he told Anderson and Appellant replies: "No, huh-uh, never." (T 1274). Anderson asked Appellant if he got another plane to go out to look for the body, and Appellant states: "Nope. Nope, nope, nope, nope, nope." (T 1278).

SUMMARY OF THE ARGUMENT

Kidnaping is a legally correct charge under felony murder theory of first degree murder, even assuming, *arguendo*, the evidence was legally insufficient to support it. Therefore, verdict utilizing general verdict form is sustainable, subject to harmless error analysis.

There was substantial, competent evidence to sustain a kidnaping verdict based upon theory of secret abduction.

ARGUMENT

POINT 1

KIDNAPING IS A LEGALLY CORRECT CHARGE UNDER FELONY MURDER THEORY OF FIRST DEGREE MURDER, EVEN ASSUMING, *ARGUENDO*, THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT IT.

The 4th DCA has certified the following question to this Court as one of great public importance:

> **Is it harmless error when a defendant is convicted by general verdict for first degree murder on the dual theories of premeditation and felony murder where the felony underlying the felony murder charge is based on a legally unsupportable theory of which the defendant is nevertheless convicted, and there is evidence in the record to support the jury's finding of premeditation?**

With all due respect to the 4th DCA, the certified question is based upon their mistaken finding below that the kidnaping charge in this case was "legally inadequate" to support a felony murder charge. The State submits that the kidnaping charge in this case was a legally valid charge - an enumerated felony under the Florida Statutes which supported the felony murder charge to the jury. While the State does not concede that the evidence in this case is insufficient to support a kidnaping charge,[1] what the 4th DCA

[1] In POINT 2, infra., is the argument as to why the kidnaping charge should be reinstated. Obviously, if the kidnaping charge is sustained, then any argument over the general verdict form becomes unnecessary.

described in its opinion below relates to a factual insufficiency of evidence to support the felony murder theory, not a legal one. Therefore, the harmless error analysis of the general verdict form was proper.

One problem in sorting through the issue in this case, is the semantic difficulty that arises when discussing the differences between legal error or inadequacy and factual insufficiency with regard to the validity of a general verdict. A review of the law in this area will illuminate those differences and how the Court should treat them.

The problem arises because courts tend to label things that are decided "as a matter of law" as "legal error," when in fact, they may simply be a factual deficiency. The United States Supreme Court addressed this problem in responding to one of the petitioner's complaints in Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

> Finally, petitioner asserts that the distinction between legal error (Yates) and insufficiency of proof (Turner) is illusory, since judgments that are not supported by the requisite minimum of proof are invalid *as a matter of law* - and indeed, in the criminal law field at least, are *constitutionally* required to be set aside. See Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Insufficiency of proof, in other words, *is* legal error. This represents a purely semantical dispute. In

> one sense "legal error" includes inadequacy of evidence - namely, when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and of appellate courts to identify and correct. In this sense "legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense - a more natural and less artful sense - the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence. The answer to petitioner's objection is simply that we are using "legal error" in the latter sense. 58-9

Id. at 502 U.S. 58-9.

The parameters of what constitutes a legal error of such a magnitude to cause rejection of a general verdict without a harmless error analysis, have been drawn by the United States Supreme Court, and adopted by this Court. If a charge violates a constitutional provision (See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)(reversing general guilty verdict under a California statute that prohibited the flying of red flags on three alternative grounds, one of which violated rights guaranteed by the First Amendment)), or is a legally inadequate theory (See Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957)(reversing general guilty verdict for conspiracy where one of the possible bases for conviction was legally inadequate because of a statutory time bar)), a general

verdict is not going to stand.

In Williams v. North Carolina, 317 U.S. 287, 87 L.Ed 279, 63 S.Ct. 207 (1942), the Court addressed invalid constitutional grounds and general verdicts. Williams was convicted of bigamous cohabitation after the jury was instructed that it could ignore Williams' Nevada divorce decree on either ground that North Carolina did not recognize decrees based on substituted service or that the decrees were procured by fraud. Id. at 290-291, 87 L.Ed 279, 63 S.Ct. 207. The former of these grounds, violated the Full Faith and Credit Clause. "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights." Id. at 292, 87 L.Ed 279, 63 S.Ct. 207.

Likewise, this Court has addressed the general verdict issue as it relates to a charge that facially, does not legally exist. In Valentine v. State, 688 So.2d 313 (Fla. 1996), cert. denied, – U.S. –, 118 S.Ct. 95, 139 L.Ed.2d 51, 66 USLW 3256 (1997), this Court held that a defendant's conviction for attempted first-degree murder would be reversed because the jury may have relied on a legally non-existent charge. The court explained:

> Valentine next argues that his conviction for attempted first-degree murder is error. We agree. The jury was instructed on two possible theories on this count, attempted first degree felony murder and attempted first degree premeditated murder, and the verdict fails to state on which ground the jury relied. After Valentine was sentenced, this Court held that the crime of attempted first degree felony murder does not exist in Florida. *See State v. Gray,* 654 So.2d 552 (Fla. 1995). Because the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed. *See Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Valentine, at 317. The 4th DCA followed suit in Spencer v. State, 693 So.2d 1001 (Fla. 4th DCA), rev. denied, 698 So.2d 1225 (Fla. 1997)(harmless error analysis improper where one of the jury charges was attempted first degree felony murder - a charge that does not exist in Florida).

In Tricarico v. State, 711 So.2d 624, 626-27 (Fla. 4th DCA 1998), Tricarico was charged with felony murder under the theory of an attempt to traffic in cocaine. In light of §782.04(1)(1), Fla. Stat. (1981), the State conceded that at the time of Tricarico's crime, attempt to traffic in cocaine was not a specified felony in the murder statute. Id. at 625. Since the underlying felony of attempt to traffic in cocaine did not legally exist under Florida law, the 4th DCA followed Yates and refused to do a harmless error

analysis.

What all the previous cases have in common, is that the legal deficiency of one underlying charge was either the charge's unconstitutionality, or the charge was legally non-existent *on its face*. In other words, the mistake in this line of cases was a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence.

The fact that a general verdict may stand, if harmless error, grew from the case of Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)(two conspiracy counts concerning IRS and DEA instructed to jury, but no evidence presented tying defendant to DEA count)

> A host of our decisions, both before and after Yates, has applied what Williams called "the rule of the Stromberg case" to general-verdict convictions that may have rested on an unconstitutional ground.
>
> . . .
>
> Our continued adherence to the holding of Yates is not at issue in this case. What petitioner seeks is an extension of its holding - an expansion of Stromberg - to a context in which we have never applied it before. Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in Stromberg, nor even illegal as in Yates, but merely unsupported by sufficient evidence.

Griffin at 502 U.S. 55, 56.

It is important to note that the charges against Griffin that were instructed to the jury, were both facially legal charges. There simply was no evidence tying the defendant to the DEA count. The Court noted:

> Indeed, if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction.

Griffen at 502 U.S. 60

Recalling Griffen's definition of legal error, instructing a jury on a legal charge that is not supported by any evidence does not constitute a legal error for a general verdict analysis, but is rather a factual insufficiency of the evidence. Where one has this situation, as is the case *sub judice*, a general verdict can be tested for harmless error.

This Court addressed this very issue in McKennon v. State, 403 So.2d 389, (Fla. 1981). McKennon challenged his conviction on the basis of error committed by the trial court in instructing the jury on robbery as it related to felony murder, where there was no basis in the evidence for the robbery instruction.

> When a trial judge submits a case to a jury on

> a felony-murder theory, he is obligated to define the underlying felony, State v. Jones, 377 So.2d 1163 (Fla. 1979); Robles v. State, 188 So.2d 789 (Fla. 1966), but if the facts do not support an underlying felony the case should not be submitted to the jury on that theory.
>
> . . .
>
> We find no basis in the evidence for the robbery charge. The purported bookkeeping discrepancy did not prove beyond a reasonable doubt that any funds were taken from the deceased and hence was insufficient to prove commission of a robbery. We therefore hold that the court erred in instructing on felony murder and robbery. *See Bradley v. State*, 82 Fla. 108, 89 So. 359 (1921).
>
> This holding does not require or justify reversal, however, because the state sought a conviction for murder based upon premeditation.
>
> . . .
>
> Just as in *Knight v. State*, 394 So. 2d 997 (Fla. 1981), the record reflects that there is not only sufficient but overwhelming evidence of premeditated murder.
>
> . . .
>
> We are satisfied beyond a reasonable doubt that the submission of the felony murder charge to the jury was not prejudicial and did not contribute to the appellant's conviction. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Frazier v. State*, 107 So.2d 16 (Fla. 1958).

Id. at 390-91.

This Court reinforced the idea of upholding a general verdict in the face of factual insufficiency in one charge, where the trial judge erred by submitting a factually insufficient theory before the jury in San Martin v. State, 717 So.2d 462 (Fla. 1998).

> We agree with San Martin that the evidence in this case does not support premeditation, but do not find that reversal is warranted on this basis. While it may have been error to instruct the jury on both premeditated and felony-murder, *see Mungin v. State*, 689 So.2d 1026, 1029 (Fla. 1995), any error in this regard was clearly harmless.
>
> . . .
>
> While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground (FN9)[citing Stromberg] or a legally inadequate theory, (FN10)[citing Yates] reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternate theory of guilt for which the evidence was sufficient. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Id. at 469, 470.

The issue was most recently addressed by this Court in Delgado v. State, 25 Fla.L.Weekly S79 (Fla. February 3, 2000). Delgado was indicted on two counts of first degree murder, and one count of armed burglary. The State presented a theory of felony murder - armed burglary being the underlying felony - where the

indictment stated the defendant entered or remained in the victims' dwelling with the intent to commit murder. The State's theory was that while the victims consented to the defendant being in their home, at some point this consent was withdrawn. This theory was struck down by this Court, which found that consent to enter a home is an absolute defense to burglary, and it is only the defendant who surreptitiously remains that falls within the Florida burglary statute's "remaining in" clause. Id. at S82.

This Court agreed with Delgado, that the felony murder theory, based upon the Sate's factually insufficient theory of armed burglary, should not have been presented to the jury. Since the evidence showed there was consent to enter the occupied dwelling, and this Court held that "burglary was not intended to cover the situation where an invited guest turns criminal or violent," the burglary charge failed because of a want of evidence to rebut the consent. Id. at S82.

Although it is legal error for the Delgado trial court to instruct a jury and allow them to convict on the basis of evidence that no reasonable person could regard as sufficient,

> "any error in charging the jury on that theory is harmless where the evidence supports a conviction for premeditated murder. *See Griffin v. United States,* 502 U.S. (1991); *McKennon v. State*, 403 So.2d 389 (Fla. 1981)(finding error to instruct on robbery as

> it relates to felony murder where there was no basis in the evidence for the robbery instruction). *See also San Martin v. State*, 717 So.2d 462 (Fla. 1998)(reversal is not warranted where general verdict could have rested upon theory of liability without adequate evidentiary support when there was alternative theory of guilt for which evidence was sufficient), *cert. denied*, 119 S.Ct. 1468 (1999).

Delgado at S82. In light of the Court's conclusion that there was sufficient evidence for premeditated murder, any errors with regard to the failed felony murder charge were harmless, "as there is no reasonable possibility that any such errors affected the verdict. *See State v. DiGulio*, 491 So.2d 1129, 1139 (Fla. 1986)("The question is whether there is a reasonable possibility that the error affected the verdict.")." Delgado, at S83.

The problem in the instant case, is that the 4th DCA has misapplied the law with regard to general verdicts where factual insufficiency is the legal error. The 4th DCA found that the State's theories of kidnaping were legally invalid. Mackerly v. State, 25 Fla.L.Weekly D722, D724 (Fla. 4th DCA, March 22, 2000). As will be shown below, this is in error as it was the evidence that was legally insufficient to support the legally valid underlying felony charge of kidnaping, contained in the felony murder charge to the jury.

Florida's murder statute states in pertinent part:

> **782.04 Murder.-**
>
> (1)(a) The unlawful killing of a human being:
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or
> (2) When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
>
> . . .
>
> f. Kidnaping,
>
> . . .

§782.04, Fla. Stat. (1997).

In light of §782.04((1)(a)2.f., it is clear that kidnaping is a legally valid charge to be the underlying felony in a felony murder charge. In the instant case, Mackerley was indicted for kidnaping in COUNT II, in pertinent part, as follows:

> COUNT II
>
> . . . Alan Mackerly . . . did unlawfully and forcibly, secretly, or by threat, confine, abduct, or imprison the person of Frank Black, against that person's will and without lawful authority, with intent to commit or facilitate the commission of another felony, and/or inflict bodily harm upon or to terrorize the victim or another person in violation of Florida Statute 787.01; . . . .

(R 29).

The charge of kidnaping for which Mackerley was indicted, included all the essential elements required by §787.01 to make out

a legally valid kidnaping charge. Further, the trial court correctly instructed the jury on kidnaping in accordance with the Florida Standard Jury Instructions in Criminal Cases (T 1327-28). The evidentiary theories the State argued to try and prove the kidnaping charge are not determinative of whether it is a legally valid charging.

The 4th DCA appears to misconstrue this Court's reasoning and holding in Delgado, believing that Delgado upheld a general verdict where the underlying felony - armed burglary - was legally invalid, rather than just unsupported by the evidence. Reading Delgado as the 4th DCA did, would require this Court to reject Stromberg, Williams, and Yates. Since this Court formally announced in Delgado that it was receding from Robertson v. State, 699 So.2d 1343 (Fla. 1997), Jiminez v. State, 703 So.2d 437 (Fla. 1997) and Raleigh v. State, 705 So.2d 1324 (Fla. 1997) with regard to its interpretation of burglary in Florida, Delgado at S81, it is hard to imagine this Court receding from Stromberg, Williams, and Yates without so stating.

What the 4th DCA is citing as legal invalidity in Delgado and in Mackerley, is in reality a lack of sufficient evidence presented by the State to prove the underlying, legally valid charge. The court believed a judgement of acquittal should have been granted,

meaning it was legal error for the trial court to instruct the jury on kidnaping. Mackerley at D724. But as was the case in Griffen, McKennon, San Martin, and Delgado, committing legal error in instructing on a charge that is not supported by the evidence does not warrant reversal where the State put on overwhelming evidence of premeditation.

The 4th DCA reluctantly upheld Mackerley's murder conviction because it believed Delgado required it to do so. Mackerly at D725. While that is the right result with regard to the instant premeditated murder charge, it should have been made because the 4th DCA was following not only Delgado, but also Griffen, McKennon, and San Martin.

POINT 2

THE KIDNAPING CHARGE WAS SUPPORTED BY SUFFICIENT EVIDENCE, AND THE CONVICTION SHOULD BE REINSTATED.

The 4th DCA has ruled that the trial court erred in not granting Appellant's motion for judgement of acquittal on the kidnaping charge. The court believed the State's kidnaping theory was either 1) the luring of the victim to Florida under the pretense of a business deal, or 2) Appellant placing the victim in a headlock prior to shooting him. Neither theory was sufficient to prove kidnaping under Florida law in the court's view. Mackerly v.

State, 25 Fla.L.Weekly D722, D724 (Fla. 4th DCA, March 22, 2000). The mistake the 4th DCA made, is in separating the facts of this case into separate theories of kidnaping, rather than considering them together as a whole, as a secret abduction. The State argued the theory of "secret abduction" to the jury.:

> Kidnaping as we discussed in jury selection is secretly abducting someone with the purpose of doing harm to them, terrorizing them or in this case as charged committing murder upon them. That is kidnaping. The law is that if you do this under false pretenses, someone doesn't know that they're being led somewhere for that purpose, it's done by a ruse, then that is kidnaping if the person who's luring them does so with the intent to commit harm upon them or terrorize them.

(T 1240).

The State's theory as argued to the jury, was that the victim was secretly abducted. While luring is not expressly included in Florida's kidnaping statute, §787.01(1)(a)2. and 3., Fla. Stat. (1997), secretly abducting expressly is. As the 4th DCA correctly pointed out, "the word 'secretly' modifies 'confining, abducting or imprisoning'." Mackerley at D724. The 4th DCA did not believe there was any confining, abducting or imprisoning in this case, but the evidence, and the reasonable inferences to be drawn therefrom, prove otherwise.

An appellate court may not retry a case or reweigh the

evidence. Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995); State v. Law, 559 So. 2d 187, 188 (Fla. 1989); Clark v. State, 379 So. 2d 97, 101 (Fla. 1979). A judgment of conviction comes to an appellate court clothed with the presumption of correctness, and an appellant's claim of insufficiency of the evidence cannot prevail where there is competent substantial evidence to support the verdict and judgment. Terry v. State, 668 So. 2d 954 (Fla. 1996). Competent evidence is evidence which is probative of the fact or facts to be proven. Brumley v. State, 500 So. 2d 233 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. Id. Competent substantial evidence, therefore, is such evidence, in character, weight or amount as will legally justify the judicial or official action demanded. Terry v. State, 668 So. 2d 954 (Fla. 1996).

When evidence supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing party. Johnson v. State, 660 So. 2d 637 (Fla. 1995). The relevant question on appeal is, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, whether there is competent, substantial evidence to support the jury's verdict and judgment.

Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982).

Florida Statute §787.01(1)(a) (1997) defines kidnapping as "forcibly, secretly, or by threat confining, abducting, or imprisoning another against her or his will and without lawful authority . . ." The term "secretly" "means that the abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or communication with the public." McCarter v. State, 463 So. 2d 546, 551 n.2 (Fla. 5th DCA 1985). See Bedford v. State, 589 So.2d 245, 251 (Fla. 1991)(transport of victim to isolated area was tantamount to "secretly" abducting and confining); Gay v. State, 607 So. 2d 454, 458 (Fla. 1st DCA 1992)(victim taken from pool to trail was kidnapped because of intent to isolate victim from contact with public). Although a victim may have voluntarily engaged with the kidnapper, evidence can prove that at some point the victim was held unwillingly. Sochor v. State, 619 So.2d 285, 289 (Fla. 1993). Removal of a victim to a secluded area is not incidental to or inherent in the crime of murder. Id.

If there are factual conflicts as to whether the victim voluntarily or unwillingly went with the alleged kidnapper, these issues are to be determined by the jury. Gore v State, 599 So. 2d

978, 985 (Fla. 1992). Evidence that indicates the victim's accompaniment with the kidnapper ceased to be voluntary is sufficient for the jury to find competent, substantial evidence of a kidnapping. Id. Evidence indicating that the victim was abducted and confined against the victim's will is sufficient evidence to support the finding that the victim was kidnapped, despite contrary evidence that the victim went willingly. Bedford v. State, 589 So. 2d at 251. If the evidence shows that the victim was taken to an isolated area with no possibility of meaningful contact with the public, tantamount to a "secret" abduction, the jury could reasonably find that this was legally sufficient evidence to prove the kidnapping charge. Robinson v. State, 462 So. 2d 471, 476 (Fla. 1st DCA 1984). See Miller v. State, 233 So. 2d 448, 450 (Fla. 1st DCA 1970)(circumstantial evidence that defendant lured victim and kept her away from anyone she knew for a period of time constituted sufficient evidence to submit kidnaping charge to jury on basis that victim secretly confined).

In the instant case, viewed in the light most favorable to the verdict, there is sufficient competent, substantial evidence that the victim was secretly abducted. The kidnaping in this case began when the victim got tricked into getting on the plane to Florida, and certainly continued when he got in the rental car with

Ms. Costello. While there is no way to determine whether the victim got into the car voluntarily or not, two things are true. Once in the car, the victim was no longer in control of his movements, and it is not necessary to prove that getting into the car was against his will.

This Court has recognized that even should one voluntarily get into a vehicle, if at some point thereafter one is held unwillingly, that is sufficient to make out kidnaping. Sochor v. State, 619 So.2d 285, 289 (Fla. 1993).

> We also find sufficient evidence of kidnaping to support Sochor's conviction on a felony-murder theory. (FN4) The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly. Her removal from the lounge parking lot to a secluded facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime. Thus, the evidence supports the underlying felony of kidnaping as well as Sochor's separate conviction of kidnaping.

Id.

But for the actions of Appellant and Ms. Costello, the victim never would have been in Florida. The victim was lured by Appellant and his accomplice, Lisa Costello (posing as Mia Giordano) down to West Palm Beach, Florida on the guise of a proposed business deal. Appellant would not have gone to Florida and isolated himself from his friends and family if it were not for

this feigned business proposition. While one may argue the victim voluntarily came to Florida, it is clear that before his murder, he was isolated and evidenced the fact that the secret abduction was against his will.

The victim recognized Appellant when he was brought to Appellant's house, and it is an infinitely reasonable inference to believe he tried to leave at that point. The headlock was utilized by Appellant to prevent the victim from leaving. It was after the victim was placed in the headlock that Appellant took the gun from Costello - and then used it. It is unnecessary to decide whether the headlock itself constituted kidnaping, but it certainly proves the victim's presence with Appellant was against his will. The isolation from friends, family, and safety culminated by the headlock, completes the crime of kidnaping by secret abduction.

In addition, there was evidence that the victim was incapable of resisting Appellant. Mr. Anderson asked Appellant whether the victim had resisted. Mr. Anderson thought that once the victim recognized Appellant, he would be in a panic having realized that something was amiss. Appellant told him that the victim wasn't capable of resisting. When you couple that statement with the fact that Ms. Costello had possession of the date-rape drug Rohypnol, Appellant may well have been incapable of leaving. This is also

proof from which the jury could infer that he was being abducted against his will.

The 4th DCA decided that the headlock the victim was placed in "had no significance independent of the murder and was merely incidental to the shooting." Mackerley at D724 (citing Faison v. State, 426 So.2d 963, 965 (Fla. 1983)). In Faison, this Court approved of the kidnaping test found in Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980), which adopted the test from State v. Buggs, 219 Kan. 203, 547 P.2d 720 (1976):

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963, 965 (Fla. 1983).

The headlock was the end point of the secret abduction - the kidnaping - not simply incidental to the crime of murder. This murder would not have occurred had there been no kidnaping, and it is impossible to say that everything that led the victim to

Appellant's house was merely incidental to the crime of murder. None of the cases cited by Appellant concern the factual scenario we have in the instant case. The first part of the Faison kidnaping test is satisfied; the secret abduction was not slight, inconsequential and merely incidental to the murder.

Likewise, the kidnaping was not inherent in the nature of the murder itself. One does not need to secretly abduct someone in order to shoot them. Appellant could have gone to New Jersey, to shoot the victim; or the airport, or the rental car center. Although Appellant cites numerous robbery and sexual assault cases, none of them involved such an extensive effort over a significant time period to get an individually selected victim to a certain place at a certain time in order to commit a certain crime. The second prong of the Faison test has been met.

Lastly, the secret abduction had significance independent of the murder. The whole purpose of the secret abduction was to bring the victim to Appellant so he could kill him. Obviously, the kidnaping made it substantially easier for Appellant to murder the victim. It got the victim under his control and on Appellant's own turf. In addition, the fact that the kidnaping took the victim to a place where nobody would witness the murder, substantially lessened the risk of detection. Had Appellant not spoken to Mr.

Anderson about how he murdered the victim, it would have been a much more difficult case to prove - perhaps impossible. There were no other non-involved eye-witnesses to this murder, specifically because of the kidnaping. The third Faison prong has met by the evidence.

Since all three prongs of the Faison kidnaping test have been met, and substantial, competent evidence supports the secret abduction of the victim, the kidnaping charge should not have been reversed by the 4th DCA.

CONCLUSION

Wherefore, based on the foregoing arguments and the

authorities cited therein, this Court should affirm the murder conviction, reverse the 4th DCA and reinstate the kidnaping conviction, and affirm the sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Respondent on Merits" has been furnished by U.S. Mail, to: PAUL MORRIS, ESQ., and STEPHEN H. ROSEN, ESQ., 999 Ponce de Leon Blvd., Suite 500, Coral gables, FL 33134 on June _____, 2000.

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